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DIVISION II
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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON
No. 36888-9-II

SHARON K. MARSHALL (f/k/a RASH), APPELLANT
V.
KENNETH RICHARD RASH, RESPONDENT

BRIEF OF RESPONDENT

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ORIGINAL

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INTRODUCTION

The mother's appeal is an unfortunate waste of the parties' resources and this Court's time. The only real issue in this appeal is whether the mother should be sanctioned under the appropriate rules. The father asks for this court to affirm the trial court and to award attorney fees to the father for having to resist this misdirected appeal.

RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion by entering an order of contempt upon the mother's refusal to comply with a specific order directing her compliance with the Parenting Plan when she completely failed to modify, adjust or otherwise change the Parenting Plan?
2. Is the GAL report controlling upon the order directing the mother's compliance with the Parenting Plan?
3. Is application of sanctions appropriate when the mother has brought forward a frivolous appeal, which could have been avoided but for her completely negligent prosecution of her claims to the trial court?
4. Should this court award attorney fees to the father for the cost of defending this appeal?

RESTATEMENT OF THE CASE

Mother's reliance on a three year old GAL report, wherein the recommendations were never adopted by the court, is completely

misplaced in this case. Throughout the litigation in the trial court, the mother has overemphasized and exaggerated the import of the GAL report as if it had the same weight as a court order. An example of this obsession with the GAL report can be found in the Clerk's Papers, wherein the mother has submitted the GAL report three times for this Court's record. CP 1 – 18, CP 25 – 42, and CP 62 – 79.

The parties began a dissolution action in May 2003, which was finalized on June 23, 2004, wherein a parenting plan was entered for their two children. CP 2, CP 85 - 91. By May of 2005, the parties entered into a mediated agreement to allow their daughter to live with the father. CP 3. Later that summer, a parenting plan modification proceeding began, and a Guardian ad Litem was appointed, whose report was filed with the Court on September 9, 2005. CP 1 - 18.

The recommendations of the GAL were that primary residential custody of the children be with the mother, that the mother have sole decision making, that the daughter remain in private school and receive counseling, and that father's visitation with their daughter be professionally supervised. CP 16 – 17. These recommendations were never adopted by the trial court in a parenting plan or any other sort of order.

On December 5, 2006, pursuant to attempts by the father to exercise visitation, the trial court, through the Hon. Court Commissioner David Johnson, entered an Order on Show Cause, which declined to find the mother in contempt. CP 49 – 53. The trial court noted that the mother “had the ability to comply, but does not have the present willingness to comply with the order”. CP 50.

On May 2, 2007, in order to ensure the ability to exercise summer visitation as set forth in the Parenting Plan, the father motioned the trial court for an Order re: Compliance with Parenting Plan. CP 167 – 168. On June 4, 2007, through the Hon. Court Commissioner James Marshall, the trial court entered an Order re: Compliance with Parenting Plan. CP 54 – 56. Said order set forth that:

The father shall have summer visitation as follows: Pursuant to the Parenting Plan on June 23, 2004, which remains unmodified. Based upon the Parenting Plan, the father is legally justified to plan for exercising visitation from July 1 – August 15 and make travel arrangements including purchase of plane tickets.

Absent a court order to the contrary, the visitation per the Parenting Plan shall occur.

CP 55. On June 28, 2007, without the benefit of obtaining a “court order to the contrary”, through counsel, the mother set forth that she “would not be sending the child.” CP 101.

On July 5, 2007, the father obtained an Order to Show Cause for a contempt hearing regarding the mother's noncompliance with the Parenting Plan and the Order re: Compliance with Parenting Plan. CP 106 – 107. The contempt matter was heard on July 18, 2007 by Commissioner Marshall and the trial court found the mother in contempt. CP 131 – 136. The orders of the court had been violated in the following manner:

Sharon K. Rash has intentionally failed to comply with the provisions ordering: 1). Visitation for the father with the children per the court's orders or filing a motion to suspend the father's visitation prior to July 1, 2007.

CP 132.

On September 11, 2007, at the mother's insistence, a revision hearing was held before the Hon. Judge Susan K. Serko. The mother's motion to revise was denied, and the father was awarded additional attorney fees for having to respond to the revision motion. CP 142. In doing so, the trial court set forth:

On December 2, 2007, the parties' daughter, their youngest child, turned 18, rendering all parenting disputes moot. CP 143.

ARGUMENT

A. Standard of Review

Respondent agrees with the mother that a trial court's decision on contempt shall not be disturbed absent abuse of discretion. Respondent

further agrees that a parent seeking a contempt order must demonstrate the contemnor's bad faith or intentional misconduct by a preponderance of the evidence. Respondent concurs that that once the moving party has established a prima facie case, the contemnor must rebut that showing with evidence of legitimate reasons for failing to comply with the parenting plan. Upon such rebuttal, the trial court will then weigh the evidence in the traditional manner and determine whether the moving party has met his or her burden. If so, the statute directs that a contempt order issue. In re Marriage of James, 79. Wn.App. 436, 443, 903 P.2d 470 (1995).

B. The Mother's Actions Do Not Constitute a Reasonable Excuse

The mother has mischaracterized her defiance of the trial court as "reasonable" and bases said reliance upon the December 2006 failure of the court to enter an order of contempt against her. BA 10. Specifically, the mother has set forth "it was reasonable for Ms. Marshall to not send the child in violation of the parenting plan." BA 10. However, her reliance upon what the trial court previously ordered is misplaced, and as such, her argument is flawed.

The circumstances before the trial court in December 2006 versus the circumstances in the Spring/Summer of 2007 are markedly different. In 2007, the trial court had a separate order requiring the mother's specific

compliance with the parenting plan. Inasmuch as the trial court did not enter contempt or otherwise enforce compliance with the Parenting Plan in December, in order to ensure that he would have summer visitation, the father went the extra step and noted the motion requiring compliance with the Parenting Plan. CP 167 -168. Pursuant to said motion, the trial court entered an Order that specifically directed the summer visitation for 2007 to occur. CP 54 – 56. The trial court was unequivocally clear that “absent a court order to the contrary, the visitation per the Parenting Plan shall occur.” CP 55.

Notwithstanding the trial court’s clarity in its directive, the mother did not send the child. In fact, the mother’s unabashed contempt for the order of the trial court is evident in the fact that she had no intention of compliance. CP 101. This action was unreasonable. Reliance upon a previous Commissioner’s ruling in the face of a specific directive to comply is not a reasonable excuse for contempt.

What makes the mother’s actions so patently unreasonable, is that the trial court gave her a roadmap setting forth what she needed to do in order to achieve her end of not sending the child. In setting forth that the visitation would occur, the trial court explicitly stated “absent a court order to the contrary.” CP 55. As such, it would have been reasonable for the mother to have sought such an order prior to the commencement of the

summer visitation period. It is absolutely inexcusable to sit on one's hands and simply defy the trial court's order. The mother's actions here do not even come close to a reasonable excuse for her failure to comply as the statute requires.

The mother's failure to enter a "court order to the contrary" is indicative of the over-emphasis that she has placed upon the years old GAL report. The mother's hope that the dramatic allegations and claims therein would absolve her from compliance with the trial court's orders is unreasonable. Nowhere in RCW 26.09.220 and 26.12.175, does the report of a GAL substitute for court order.

As a means to proffer an excuse, the mother would somehow like this court to believe that upon revision, an isolated remark of the trial court somehow makes the her conduct reasonable, however, nothing could be further from the truth. The trial court was unequivocal in its finding that the mother was in contempt.

Motion to revise is denied. The order of Commissioner Johnson, in this Court's opinion, does not become the law of the case. There potentially were multiple violations of the parenting plan and Mr. Rash is free to bring new motions on each of those if he thinks it's appropriate. I agree with Commissioner Marshall's analysis, quite frankly, and believe that between June 4th and July 1st there was ample time to attempt to modify -- file a petition to modify and attempt to get some kind of restraint and put a rubber stamp of approval, at least temporarily, on the recommendations of the guardian ad litem that were two

years prior. But that wasn't done and so the fact that there was a finding of contempt on July 25th, 2007, in this Court's opinion, was exactly correct. It was a legal finding and Commissioner Marshall may have done something different had there been an order or some action taken in the last three weeks of June, but that wasn't done.

And so, technically, Mr. Rash had a legitimate expectation that he could expect his daughter to be placed on a plane on July 1st and that he could exercise visitation in conformance with what the Court's order was that was in place. That's why we have procedures, I think, to modify, to restrain, to attempt to modify court orders that were in place; but this was a violation of the court order that was in place. It was contempt. Maybe it was justifiable, but it still was contempt in this Court's opinion.

RP 22 – 23. There is no doubt about the trial court's finding of contempt, and that the mother's failure to act was unreasonable.

In this case, the mother has not contested that the father made a prima facie showing of contempt. She doesn't deny her willful noncompliance with the orders of the trial court. All she offers to this court is a flimsy excuse that her noncompliance was reasonable. As noted above, there was nothing reasonable about the mother sitting idly by in the face of a specific order directing her compliance with the parenting plan. As such, the trial court did not abuse its discretion by entering an order of contempt.

C. Collateral Estoppel & Res Judicata Doctrines Are Inapplicable

Though she failed to brief these concepts to the trial court, the mother desperately attempts to asset various theories concerning the law of the case using collateral estoppel and res judicata. To support her argument now, she relies upon the following statement uttered by her own counsel, “Commissioner Johnson heard the same exact fact pattern and did not find her in contempt. And that’s what – I’m thinking that that then becomes the law of the case.” BA 12, RP 11.

The mother’s claim, based upon her attorney’s argument is preposterous. As noted above, and as found by the trial court the exact same fact pattern did not exist. RP 22. Just because counsel has argued that he was thinking otherwise, does not actually change the facts. The difference is that in the latter action for contempt in 2007, the mother was under a subsequent order requiring her to act. CP 54 – 56. She was to comply with the parenting plan and provide the child for summer visitation, or get a court order to the contrary. CP 55. She did neither. As a result, both the issues and claims before the trial court were different and, as such, not subject to being precluded.

This is not a situation of collateral estoppel or res judicata. Collateral estoppel or issue preclusion, requires (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior

adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. Shoemaker v. City of Bremerton, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987). In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action. *Id.*

In this case, the mother cannot assert the doctrine of collateral estoppel to act as a bar against the imposition of contempt upon her by the trial court. Collateral estoppel is inapplicable as the issues are not identical—there was a separate court order which was being violated by the mother, there was no final judgment, and preclusion of the issue does work an injustice as the father would never be able to seek the exercise of visitation if estoppel were allowed based upon the December 2006 trial court order which failed to find contempt. Most importantly, the issue to be precluded, that being the failure of the mother to comply with the June 2007 Order re: Compliance with Parenting Plan was not actually litigated, nor necessarily determined. As such, application of collateral estoppel is inappropriate.

Under the doctrine of res judicata, or claim preclusion, a prior judgment will bar litigation of a subsequent claim if the prior judgment has a concurrence of identity with the subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of

the persons for or against whom the claim is made. In re Election Contest Filed by Coday, 156 Wn.2d 485, 500-01, 130 P.3d 809 (2006).

Similar to the inapplicability of collateral estoppel, the doctrine of res judicata is wholly inappropriate. Here there is no prior judgment that has a concurrence of identity; the claims made in the summer 2007 contempt action are markedly different from the case made in December 2006 wherein contempt was not found.

Once again, it would seem that the mother's over-emphasis of the GAL report from 2005 is evident. The GAL report is not a controlling document; it was not interpreted, nor otherwise adopted by the trial court in December 2006. All that occurred at that hearing was that the court declined to find the mother in contempt. In the subsequent contempt hearing in the summer of 2007, the court had a specific order to gauge the mother's non-compliance; the Order re: Compliance with Parenting Plan, entered in June 2007. CP 54 – 56. There is no viable argument that the mother can make that the contempt action was somehow precluded.

D. Attorney Fees and Sanctions Are Appropriate

The father requests an award of fees under RCW 26.09.140. He will of course comply with the financial affidavit requirements of RAP 18.1(c) (requiring service of financial affidavit no later than 10 days prior to the date the case is set for oral argument).

One factor that the court could consider in ruling on attorney fees, in addition to RCW 26.09.140, is the wasteful nature of this appeal. As both of the parties children are over the age of 18 and are no longer dependent, this appeal is entirely frivolous. In finding the mother in contempt, she was ordered to pay in attorney fees and costs a sum just over three thousand dollars. CP 131 – 136, 142. The attorney fees incurred by both parties in this appeal will far exceed that amount. This is wasteful litigation and the court should award fees for this reason only.

Another factor to award fees to the father is as a sanction imposed upon the mother under RAP 18.9 or Civil Rule 11 for the baseless nature of this appeal as well as the meritless revision action in the trial court. The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. Biggs v. Vail, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). Sanctions are properly imposed if three conditions are met: (1) the action is not well grounded in fact; (2) it is not warranted by existing law; and (3) the attorney signing the pleading has failed to conduct reasonable inquiry into the factual or legal basis of the action. John Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 110, 780 P.2d 853 (1989).

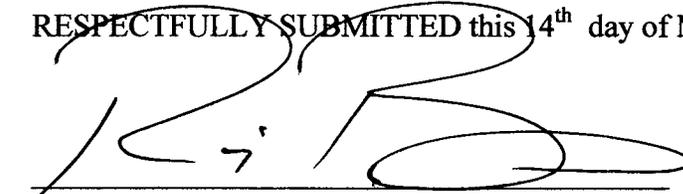
In this case, upon entry of the June 4, 2007 Order re: Compliance with Parenting Plan, the entirety of the subsequent litigation lies at the mother's culpable doorstep. She failed to comply, or secure a court order,

resulting in her contempt. Her defiance of the court had no defense in fact. Her motion for revision and pursuit of this appeal are not warranted by existing law; the consequences of noncompliance were clear. Lastly, her counsel, while well-learned in matters of family law, has blindly brought a meritless appeal. Upon even the most cursory review of this matter, one readily can come to the conclusion that a directive order was in place and alternative road map created (if the party did not want to comply), and neither occurred. The mother has defied the order and chose not to pursue an avenue that could have availed her of relief. Such callous disregard for the order of the court is sanctionable.

CONCLUSION

Respondent Kenneth Rash respectfully submits that the trial court correctly imposed contempt upon Appellant Marshall. The court should affirm, sanction the Appellant, and award fees, costs and sanct and costs to Respondent.

RESPECTFULLY SUBMITTED this 14th day of May 2008.

A handwritten signature in black ink, appearing to read 'Raj Bains', is written over a horizontal line. The signature is stylized with large, sweeping loops.

RAJ BAINS
WSBA # 22459
Attorney for Respondent Kenneth Rash

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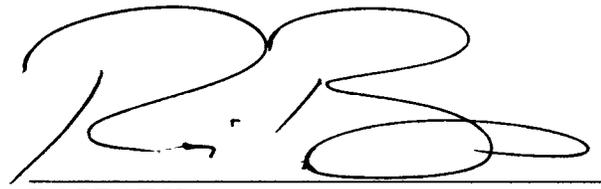
CERTIFICATE OF SERVICE

I certify that on the 14th day of May, 2008, I caused a true and correct copy of this Brief of Respondent to be filed with the appellate court as well as served on the following in the manner indicated below:

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